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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

RICHARD REYNALDO GARCIA,

Petitioner,

vs. No.

STATE OF NEW MEXICO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW MEXICO

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QUESTIONS FOR REVIEW

Are New Mexico's Uniform Jury Instructions for capital sentencing proceedings unconstitutional in that:

1) the instructions provide insufficient guidance about the relationship between aggravating and mitigating circumstances and the burden of proof thereon; and

2) the instructions, by permitting unrestricted consideration of "the defendant and the crime," do not sufficiently channel discretion according to clear and objective standards?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

Richard Reynaldo Garcia respectfully petitions this Court to review a judgment of the Supreme Court of New Mexico. The judgment affirmed his two convictions of murder and his sentences of life imprisonment and of death.

CITATION TO OPINION

The opinion of the court below is unofficially reported at 22 State Bar of New Mexico Bulletin 139. A copy of the unofficial opinion is included in the appendix. The opinion is not yet officially reported in New Mexico Reports [N.M.] or in Pacific Reporter [P.2d].

JURISDICTION

The judgment sought to be reviewed was filed January 20, 1983. Rehearing was not requested. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

STATUTORY PROVISIONS AND UNIFORM JURY INSTRUCTIONS

The death penalty was imposed pursuant to New Mexico's Capital Felony Sentencing Act, Section 31-20A-1 through Section 31-20A-6, N.M.S.A. 1978 (1981 Repl.Pam.) (effective July 1, 1979). It is the first sentence of death under the statute to be affirmed by the New Mexico Supreme Court. The statute is set out verbatim in the appendix to this petition.

The case also involves certain Uniform Jury Instructions. Uniform Jury Instructions have been adopted by the Supreme Court of New Mexico for all criminal cases. [They are hereinafter cited as "N.M.U.J.I. Crim."] Their General Use Note states in pertinent part:

> Except for grand jury proceedings, when a uniform instruction is provided for the elements of a crime, a defense or a general explanatory instruction on evidence or trial procedure, the uniform instruction must be used without substantive modification or substitution. In no event may an elements instruction be altered or an instruction given on a subject which a use note directs that no instruction be given. For any other matter, if the court determines that a uniform instruction must be altered, the reasons for the alteration must be stated in the record.
>
> General Use Note, N.M.U.J.I. Crim., N.M.S.A. 1978 (1982 Repl.Pam.).

The Capital Felony Sentencing Act has been implemented by mandatory Uniform Instructions. See N.M.U.J.I. Crim. 39.10 through 39.43. The pertinent instructions are included in the appendix and are the ones in effect at the time of petitioner's trial. (These instructions were subsequently amended.) Copies of the actual instructions given at petitioner's sentencing proceeding are also included in the appendix.

STATEMENT OF THE CASE

I. GUILT STAGE

The petitioner was indicted on two counts of murder. At the time of the killings, he was an inmate at the Penitentiary of New Mexico. The victims were another inmate and a correctional officer. A third inmate, Jesse Trujillo, was charged for the same murders and for assault on another correctional officer. Both defendants were charged with capital murder. The aggravating circumstance charged was intentional murder of a correctional employee by an inmate. See Section 31-20A-5E, N.M.S.A. 1978 (1981 Repl.Pam.).

Petitioner Garcia was tried before a jury and convicted as charged on both counts. (The trial evidence is summarized in the opinion

below.) In accordance with New Mexico procedure, sentencing proceedings were thereafter conducted before the same jury.[1]

II. SENTENCING STAGE

No additional evidence was presented at the sentencing stage. The trial judge gave the uniform opening instruction and both counsel made argument. The jury was then given the remaining instructions.

The jury was instructed on the elements of the aggravating circumstance. They were instructed that they must first determine whether each element of the aggravating circumstance existed beyond a reasonable doubt. If they so found unanimously, they were then to consider whether any mitigating circumstances existed and to determine the penalty. The jury was instructed as to four specific mitigating circumstances. They were also told that they could consider in mitigation "any other circumstances relating to this case and/or to the defendant."[2] The jury was further instructed as follows:

> The law provides that you cannot sentence the defendant to death unless you are satisfied beyond a reasonable doubt that the murder was committed under the aggravating circumstance charged. The burden is always on the state to prove beyond a reasonable doubt that the murder was committed under the aggravating circumstance charged and that the mitigating circumstances do not outweigh the aggravating circumstance.
>
> N.M.U.J.I. Crim. 39.31 (written instruction on burden of proof) (emphasis added); R. at 180.
>
> * * *
>
> If you have unanimously agreed on a finding that the aggravating circumstance charged was present, you must then consider the penalty to be imposed in this case. In determining the penalty to be imposed, you must consider all of the evidence admitted during this sentencing proceeding and the evidence admitted during the trial in which the defendant

---

1. Jesse Trujillo was tried before a different jury and convicted of both murders and of assault. At the sentencing proceedings, however, that jury did not impose a sentence of death. Sentences of life imprisonment were therefore imposed by the trial court. Trujillo's convictions were affirmed on appeal. State v. Trujillo, ___ N.M. ___, 657 P.2d 107 (1982).

2. This particular instruction was a modification of the applicable Uniform Jury Instruction. It was given at defense request, over objection by the State. The uniform instruction does not contain the language quoted above or its equivalent. See R. at 172; compare with N.M.U.J.I. Crim. 39.30. An instructions conference was held prior to the sentencing proceeding. See T. 248 at 605-715.

was found guilty of murder. You must then consider whether there are any mitigating circumstances.

If you find there are mitigating circumstances, you must then weigh the mitigating circumstances against the aggravating circumstance you have found in this case. After weighing the aggravating circumstance and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment.

If you fail to unanimously agree that the death penalty should be imposed, a penalty of life imprisonment will be imposed by the court. * * *.

N.M.U.J.I. Crim. 39.33 (concluding written instruction) (emphasis added); R. at 187.

Pursuant to the uniform instructions, the jury made two written findings. They unanimously found beyond a reasonable doubt that the aggravating circumstance existed as charged. They unanimously agreed that petitioner should be sentenced to death. R. at 188. Sentence was imposed accordingly and petitioner appealed to the New Mexico Supreme Court.

III. APPEAL

The petitioner on appeal challenged the constitutionality of two Uniform Jury Instructions. Defense counsel did not object to the instructions at trial.[3] This issue was therefore raised on appeal for the first time. It was raised under New Mexico's doctrine of fundamental error (Rule of Criminal Appellate Procedure 308(b), N.M.S.A. 1978) and pursuant to Section 31-20A-4B of the Capital Felony Sentencing Act, N.M.S.A. 1978 (1981 Repl.Pam.).

The Supreme Court discussed and rejected on the merits petitioner's arguments. The court concluded: "We find no fault with these jury instructions." The court went on to hold that objections to jury instructions could not be first raised on appeal. Senior Justice Sosa dissented on both points. The two challenged instructions, followed by a summary of petitioner's arguments, are set forth below.

3. Petitioner was declared an indigent and trial counsel represented him under contract with the New Mexico Public Defender Department. There was apparently a conflict of interest at the trial level. On appeal, the Appellate Division of the Public Defender Department was appointed to represent petitioner by the Supreme Court of New Mexico.

> The law provides that you cannot sentence the defendant to death unless you are satisfied beyond a reasonable doubt that the murder was committed under the aggravating circumstance charged. The burden is always on the state to prove beyond a reasonable doubt that the murder was committed under the aggravating circumstance charged and that the mitigating circumstances do not outweigh the aggravating circumstance.
>
> N.M.U.J.I. Crim. 39.31, supra (emphasis added).
>
> * * *
>
> If you have unanimously agreed on a finding that the aggravating circumstance charged was present, you must then consider the penalty to be imposed in this case. In determining the penalty to be imposed, you must consider all of the evidence admitted during this sentencing proceeding and the evidence admitted during the trial in which the defendant was found guilty of murder. You must then consider whether there are any mitigating circumstances.
>
> If you find there are mitigating circumstances, you must then weigh the mitigating circumstances against the aggravating circumstance you have found in this case. After weighing the aggravating circumstance and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment.
>
> N.M.U.J.I. Crim. 39.33, supra (emphasis added).

Petitioner contended that these instructions are inadequate under the Eighth and Fourteenth Amendments of the federal Constitution. The first instruction requires the State to prove beyond a reasonable doubt that the aggravating circumstance exists and "that the mitigating circumstances do not outweigh the aggravating circumstance." The latter burden of proof involves a negative proposition and is in this respect confusing. Moreover, it does not provide the jury with "detailed and specific guidance." See Godfrey v. Georgia, 446 U.S. 420 at 428 (1980). It leaves open the possibility that aggravation and mitigation will be found to exist in equal balance. It gives no guidance to the jury in such a situation: has the State met its burden of proof or not?

The concluding uniform instruction tells the jury to weigh the aggravating and mitigating circumstances -- with no standard of proof or further guidance -- and to then consider "both the defendant and the crime." The language of the instruction was adopted verbatim from the

Capital Felony Sentencing Act. See Section 31-20A-2B, N.M.S.A. 1978 (1981 Repl.Pam.). This instruction does not sufficiently "channel the [jury's] discretion by clear and objective standards." Godfrey v. Georgia, supra. "The defendant and the crime" is a standard of broadness and subjectivity. Without some limitation on its use, it injects a degree of unfettered discretion into the final sentencing determination. It allows virtually any factor whatever to serve as a basis for the death penalty.[4] Under New Mexico's uniform instructions, a jury can find that the charged aggravating circumstance exists, that it is balanced with the various mitigating factors but that the defendant is slovenly or arrogant or Hispanic and should therefore die.

ARGUMENT FOR ALLOWANCE OF THE WRIT OF CERTIORARI

The Supreme Court of New Mexico has affirmed the first sentence of death under the 1979 statute. In doing so, the court has decided questions involving federal constitutional law. These questions have never been settled by this Court. The questions are:

1. Whether the jury instructions provide sufficient guidance about the relationship between aggravating and mitigating circumstances and the burden of proof thereon? Cf. Harris v. Pulley, 692 F.2d 1189, 1194-1195 (9th Cir. 1982) and Ford v. Strickland, _____ F.2d _____ (11th Cir. January 7, 1983) and compare with State v. Wood, 648 P.2d 71, 83 (Utah 1982); see also Smith v. North Carolina, 51 U.S.L.W. 3418 (November 30, 1982) (Stevens, J.).

2. Whether the instructions sufficiently channel discretion by permitting unrestricted consideration of "the defendant and the crime"?

The questions at bar involve interpretation of this Court's decisions holding that:

> [The State in a capital proceeding] must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make

4. Trial counsel requested an instruction stating that, apart from the charged aggravating circumstance, the jury could not "take into account any other considerations as aggravating circumstances." The instruction was not a Uniform Jury Instruction. The State objected and it was refused by the trial court. See R. at 161; T. 24B at 605-715.

rationally reviewable the process for imposing a sentence of death.'

Godfrey v. Georgia, 446 U.S. 420 at 428 (1980) (footnotes and citations omitted).

* * *

*** [T]he Eighth and Fourteenth Amendments require that the sentencer *** not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett v. Ohio, 438 U.S. 586 at 604 (1978) (emphasis in original); accord, Eddings v. Oklahoma, 455 U.S. 104 (1982).

These latter two decisions were cited and relied upon by the court below in its opinion. Cf. also Henry v. Wainwright, 661 F.2d 56 at 58-60 (5th Cir. 1981) (consideration of nonstatutory aggravating factors impermissible), vacated and remanded on other grounds ___ U.S. ___ (1982); accord, Proffitt v. Wainwright, 685 F.2d 1227 at 1266-1269 (11th Cir. 1982); contra, Harris v. Pulley, 692 F.2d 1189 at 1194 (9th Cir. 1982).

CONCLUSION

For the foregoing reasons, Richard Reynaldo Garcia respectfully petitions this Court to issue its writ of certiorari and review the judgment below.

Respectfully submitted,

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APPENDIX

Bulletin

Advance Opinions of the Supreme Court and the Court of Appeals

From the New Mexico Supreme Court

STATE OF NEW MEXICO,
Plaintiff-Appellee,

versus

RICHARD REYNALDO GARCIA,
Defendant-Appellant.

No. 14029 (filed January 20, 1983)

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
FRANCKE, Judge

JEFF BINGAMAN, Attorney General
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Santa Fe, New Mexico
Attorneys for Appellee

MICHAEL DICKMAN, Appellate Defender
LYNNE CORR, Assistant Appellate Defender
Santa Fe, New Mexico
Attorneys for Appellant

OPINION

RIORDAN, Justice.

Richard Reynaldo Garcia (Defendant) was convicted of two murders in the first degree for which he received a sentence of life imprisonment and a sentence of death. Defendant appeals. We affirm.

The issues on appeal are:

I. Whether Corrections Officer Louis Jewett's statement was properly introduced into evidence as a dying declaration.

II. Whether references to the "Los Carnales" elicited by the State during testimony and emphasized by the State during closing arguments deprived Defendant of a fair trial.

III. Whether New Mexico's Capital Felony Sentencing Act, Sections 31-20A-1 through 31-20A-6, N.M.S.A. 1978 (Repl. Pamp. 1981), is unconstitutional because it sanctions cruel and unusual punishment.

IV. Whether the jury instructions used for sentencing were inconsistent and confusing, thereby providing inadequate standards for the jury to decide between the death penalty and life imprisonment.

V. Whether Defendant's sentence of death is excessive and/or disproportionate under the circumstances.

Defendant was convicted of killing Corrections Officer Louis Jewett (Jewett) and inmate Bobby "Barbershop" Carabajal Garcia (Bobby Garcia). On February 26, 1981, at approximately eight o'clock in the evening, Defendant, a southside porter in cellblock three (f.n. 1), asked Jewett if he could go to the northside of cellblock three to take some books to inmate Jesse Trujillo (Trujillo) (f.n. 2). The northside grill was opened for Defendant. The following events lasted only a few minutes. Defendant walked or ran into the northside tier.

Trujillo was outside his cell because he was returning from the showers. Bobby Garcia, a northside porter in cellblock three, was out on the main northside tier, talking to another inmate. Jewett was heard yelling, "You guys stop that." A brief commotion ensued among Trujillo, Defendant and Bobby Garcia. Jewett then ran towards the commotion. Bobby Garcia was next seen running towards the officers' station. Bobby Garcia, bleeding, ran through the open grill into the guard station. He was followed by Defendant, Trujillo and Jewett. Trujillo and Defendant were armed with "shanks". (f.n. 3) Bobby Garcia ran to the southwest corner of the station and picked up a plastic trash can to try to fend off Trujillo and Defendant, who were both stabbing at Bobby Garcia. Jewett jumped on Trujillo from behind and fastened a "bearhug" on him. At that point, Defendant turned his attention to Jewett and while Jewett was holding on to Trujillo, Defendant stabbed Jewett in his side or lower back. Momentarily, everything came to a standstill. Then, Bobby Garcia ran towards the basement stairs. Jewett continued to struggle as both Trujillo and Defendant stabbed at him. Two officers yelled at Jewett to join them behind the northside grill, but Jewett collapsed. The southside grill was then opened and both Defendant and Trujillo entered with blood on their hands and the shanks that they held. When other officers arrived, Defendant approached the grill and stated to Captain Joe Baca (f.n. 4), "Baca, we didn't mean to get the officer but he got in the way."

Bobby Garcia and Jewett were taken from the Penitentiary to the hospital. Bobby Garcia died shortly thereafter from multiple stab wounds to his chest and back. Jewett died approximately one month later from the injuries he sustained.

I. OFFICER JEWETT'S STATEMENT

After the stabbing, Jewett was taken to Saint Vincent Hospital in Santa Fe, New Mexico. He underwent surgery and was taken to the intensive care unit. On March 6, 1981, Jewett was moved to a regular ward because his condition started to show signs of improvement and stability. The attorneys for Defendant and the State were scheduled to take Jewett's deposition on March 26, 1981. However, the deposition was cancelled because Jewett's condition worsened. On April 2, 1981, upon learning that Jewett's health was rapidly deteriorating, an Assistant District Attorney and Officer Ross of the New Mexico State Police, went to the hospital and obtained a statement from Jewett. Jewett died on April 4, 1981.

Jewett's tape recorded statement was later transcribed. In his statement, Jewett stated that he was trying to break up a fight among Defendant, Trujillo and Bobby Garcia. He saw both Defendant and Trujillo with shanks. Both were stabbing at Bobby Garcia. Jewett stated that while he was trying to break up the fight, Defendant stabbed him in the back with a shank.

At oral argument, both attorneys agreed that the recently decided case of STATE v. QUINTANA, 98 N.M. 17, 644 P.2d 531 (1982), controls this issue of the admissibility of the dying declaration. In QUINTANA, we held that a dying declaration is admissible, when looking at the particular circumstances of a case, if there is a showing that the statement was made under a sense of "impending death".

In the present case, Officer Ross testified that at the time of the interview, Jewett looked pale and thin. During the interview, Jewett was asked, "Did they discuss your chances of improvement?", to which he answered, "Oh, yes, nil." Jewett was again asked, "Mr. Jewett, you understand what your chances of recovery are?", and Jewett answered, "Nil." Therefore, the circumstances surrounding the taking of Jewett's statement and the language in the statement itself, are sufficient to show that Jewett believed his death was imminent.

The admissibility of such evidence is within the sound discretion of the trial court, and its ruling will be upheld unless there is a showing of an abuse of that discretion. STATE v. SMITH, 92 N.M. 533, 591 P.2d 664 (1979). We find that there was no abuse of the trial court's discretion in admitting Jewett's statement.

II. LOS CARNALES

At trial, the State called to the stand cellblock three inmate Danny Macias (Macias). Before the start of Macias' testimony, Defendant made a MOTION IN LIMINE (f.n. 5) to prohibit any mention of "Los Carnales" by Macias during the trial. The trial court denied the motion and allowed the evidence for the purpose of showing motive. During Macias' testimony, Defendant objected to all the testimony concerning "Los Carnales", asserting that such testimony was irrelevent and prejudicial.

Macias testified that Defendant had come by his cell in the early evening of February 26, 1981, and briefly told Macias that he (Defendant) was going to kill Bobby Garcia. Defendant then came by about ten minutes later and again stated that he was going to kill Bobby Garcia. At this time, Macias asked why, to which Defendant answered, "he [Defendant] was talking to [Bobby Garcia]. . . that he [Defendant] was going to kill Lieutenant Mayfield (f.n. 6) if Lieutenant Mayfield testified against [him]. . . . He [Bobby Garcia] embarrassed me by saying that I wasn't going to do anything. I am going to show him that 'Los Carnales' are here to stay, we're going to run this place." Macias testified that "Los Carnales" was a gang inside the Penitentiary in which he, Defendant, Trujillo and three others were members. Macias further stated that the gang's purpose was to control the Penitentiary by controlling the inmates and the drug trade within the Penitentiary.

Sam Mascarenas, an alleged member of "Los Carnales" and an inmate in cellblock three, testified as a defense witness. When asked about "Los Carnales", he testified that it was a low-rider's club that he was trying to start in cellblock three for the "guys in population". However, the Penitentiary would not approve the proposed club.

Defendant also testified about this issue when he took the stand. He testified that he was a member of "Los Carnales", a low-rider car club in Albuquerque in 1977, and that he tried to start a low-rider car club in the Penitentiary for the "general population". He stated that his "Los Carnales" tattoo, which indicates membership in the alleged club, was tattooed on him before his incarceration. Defendant further testified that he was acting in self-defense in the stabbing of Bobby Garcia because "[Bobby Garcia] was after him" for not doing some of Bobby Garcia's porter duties.

On rebuttal, the State called cellblock three inmate Nick Sena (Sena). Sena testified that he was a member of "Los Carnales" and that "Los Carnales" was not a car club. He also testified that membership in "Los Carnales" is indicated by a tattoo, which he showed the court.

In closing arguments, the State made reference to "Los Carnales" by stating that Defendant was a member, that the reason Defendant wanted to kill Bobby Garcia was because Bobby Garcia had insulted "Los Carnales", and that the gang was organized to take over the Penitentiary.

On appeal, Defendant claims that the testimony concerning "Los Carnales" was irrelevant and so prejudicial that he was deprived of a fair trial.

N.M.R. Evid. 401, N.M.S.A. 1978, states:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Defendant claims that the evidence concerning "Los Carnales" was irrelevant. The trial court allowed the evidence to show motive. There is evidence to support the theory that the reason the stabbing occurred was because Bobby Garcia had insulted Defendant's club, "Los Carnales". Therefore, the evidence was relevant and could properly be admitted under Rule 404(b), N.M.S.A. 1978, to show motive.

N.M.R. Evid. 404(b) states:

> Evidence of other crimes, wrongs or acts . . . may. . . be admissible for . . . PROOF OF MOTIVE, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. [Emphasis added.]

Rule 404(b) allows the admissibility of motive testimony subject to the

balancing requirement of N.M.R. Evid. 403, N.M.S.A. 1978. STATE v. LOVATO, 91 N.M. 712, 580 P.2d 138 (Ct. App.), CERT. DENIED, 91 N.M. 751, 580 P.2d 972 (1978). Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of UNFAIR PREJUDICE, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. [Emphasis added.]

This balancing approach is required of the trial court in determining the admissibility of the evidence. STATE v. LOVATO, SUPRA. The fact that competent evidence may tend to prejudice a defendant is not grounds in and of itself for exclusion of that evidence. STATE v. HOGERVORST, 90 N.M. 580, 566 P.2d 828 (Ct. App.), CERT. DENIED, 90 N.M. 636, 567 P.2d 485 (1977). The trial court must determine whether the probative value of the evidence is outweighed by its prejudicial effect. ID. In doing this, the trial court must be sensitive to the potential prejudice that is always inherent in evidence of a defendant's prior wrong acts. UNITED STATES v. LUCERO, 601 F.2d 1147 (10th Cir. 1979). The trial court has a duty to excise evidence of uncharged acts if it can be done without destroying the relevancy of the evidence which addresses the charges, defenses or issues. ID. However, if the evidence is so intertwined, the trial court may allow the evidence. ID. In LUCERO, the defendant was charged with transporting forged securities in interstate commerce. The defendant had come into possession of approximately 900 blank money orders that had been stolen from a bank. Defendant transferred a quantity of the money orders to a Mexican drug dealer in exchange for drugs. The defendant's partners in the transaction had concealed thirteen money orders that were forged and passed directly by the partners. The defendant's charges resulted from these thirteen money orders. At trial, evidence of the Mexican drug transaction was allowed. On appeal, defendant claimed that the tape recorded evidence admitted at trial concerning the drug transaction was prejudicial because it referred to an unrelated crime. The appellate court agreed with the trial court's determination that because the drug transaction was so intertwined with the money order discussion, the evidence could not have been reasonably excised.

The trial court allowed the testimony concerning "Los Carnales" to show motive. The evidence concerning "Los Carnales" is so intertwined with a possible motive of Bobby Garcia's death that the trial court could not have excised it. The trial court has the discretion to admit or exclude evidence. STATE v. DAY, 91 N.M. 570, 577 P.2d 878 (Ct. App.), CERT. DENIED, 91 N.M. 491, 576 P.2d 297 (1978). We will not set aside the decision of the trial court unless there was a clear abuse of that discretion. ID. We find that the trial court did not abuse its discretion in allowing this testimony.

III. DEATH PENALTY

Defendant contends that the death penalty constitutes cruel and unusual punishment under the United States' and New Mexico's Constitutions. U.S. CONST. amend. VIII and XIV; N.M. Const., Art. II, Sec. 13. (f.n. 7)

In the landmark decision of FURMAN v. GEORGIA, 408 U.S. 238 (1972), the United States Supreme Court discussed the death penalty. The issue before the Court was whether the death penalty in the cases (f.n. 8) before the Court, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The opinion held that the carrying out of the death penalty in these particular cases did constitute cruel and unusual punishment. Each Justice wrote a separate opinion. Four of the Justices held that capital punishment is not unconstitutional PER SE; three Justices, while agreeing that the particular state statutes in FURMAN were invalid as applied, left open the question of whether capital punishment may be imposed; and the other two Justices felt that the death penalty violated the Eighth Amendment.

In GREGG v. GEORGIA, 428 U.S. 153 (1976), the Court again addressed the death penalty question and held that "the punishment of death does not

invariably violate the Constitution." ID. at 169. That same year in STATE OF NEW MEXICO ex rel. SERNA v. HODGES, 89 N.M. 351, 552 P.2d 787, OVERRULED ON DIFFERENT GROUNDS, 89 N.M. 408, 553 P.2d 688 (1976) and STATE v. RONDEAU, 89 N.M. 408, 553 P.2d 688 (1976), we held that the death penalty is not cruel and unusual punishment PER SE within the prohibition of the Eighth and Fourteenth Amendments of United States Constitution or Article II, Section 13 of the New Mexico Constitution. However, in STATE v. RONDEAU, . SUPRA, we held that New Mexico's capital punishment statute was unconstitutional because the statute imposed a mandatory death sentence. The United States Supreme Court in WOODSON v. NORTH CAROLINA, 428 U.S. 280 (1976) and ROBERTS v. LOUISIANA, 428 U.S. 325 (1976), held that mandatory death sentences which leave neither the judge nor the jury discretion to impose a lesser sentence, violated the Eighth Amendment prohibition against cruel and unusual punishment. Therefore, we continue to hold that the death penalty, in and of itself, does not violate the United States' or New Mexico's Constitutions as cruel and unusual punishment.

We next look at the constitutionality of New Mexico's current capital punishment statutes. Sections 31-20A-1 through 31-20A-6. These statutes were modeled after similar statutes in Florida, Georgia and Texas. FLA. STAT. Section 921.141 (1981); GA. CODE ANN. Section 27-2534.1 and Section 27-2537 (Cum. Supp. 1982); TEXAS STAT. ANN. art. 37.071 (Vernon 1981). (f.n. 9) These states' statutes have withstood constitutional scrutiny by the United States Supreme Court. PROFFITT v. FLORIDA, 428 U.S. 242 (1976); GREGG v. GEORGIA, SUPRA; JUREK v. TEXAS, 428 U.S. 262 (1976). These states' statutes generally provide for, as ours does:

> 1) a bifurcated hearing wherein the death penalty is considered separately, after a guilty verdict has been rendered in a capital felony case [Section 31-20A-1];
> 2) a consideration of aggravating and mitigating circumstances concerning the murder [Section 31-20A-2]; and,
> 3) an automatic and complete appellate review of any case involving the death penalty [Section 31-20A-4].

Therefore, we uphold the constitutionality of New Mexico's current capital punishment statutes.

IV. JURY INSTRUCTIONS

The jury was given N.M.U.J.I. Crim. 39.31 and 39.33, N.M.S.A. 1978 (Repl. Pamp. 1982). U.J.I. Crim. 39.31, states:

> The law provides that you cannot sentence the defendant to death unless you are satisfied beyond a reasonable doubt that the murder was committed under one or more of the aggravating circumstances charged. The burden is always on the state to prove beyond a reasonable doubt that the murder was committed under one or more of the aggravating circumstances charged and that the mitigating circumstances do not outweigh the aggravating circumstances.
>
> It is not required that the state prove this beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense - a kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.

The pertinent part of U.J.I. Crim. 39.33, states:

> If you have unanimously agreed on a finding that [the aggravating circumstance charged was] [one or more of the aggravating circumstances charged were] [Footnote omitted.] present, you must then consider the penalty to be imposed in this case. In determining the penalty to be imposed you must consider all of the evidence admitted during this proceeding and the evidence admitted during trial in which the defendant was found guilty of murder. You must then consider whether there are any mitigating circumstances.
>
> If you find there are mitigating circumstances, you must then weigh the mitigating circumstances against the [aggravating circumstance] [one or more

aggravating circumstances] [Footnote omitted.] you have found in this case. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment.

If you fail to unanimously agree that the death penalty should be imposed, a penalty of life imprisonment will be imposed by the court.

Under U.J.I. Crim. 39.31, the jury is required to make two determinations: FIRST, whether the State has proved beyond a reasonable doubt that the murder was committed under the aggravating circumstance(s) (f.n. 10) as charged, and SECOND, whether the mitigating circumstances do not outweigh the aggravating circumstance(s). Once these two determinations are made, the jury is further instructed under U.J.I. Crim. 39.33, that they must weigh the aggravating circumstance(s) and mitigating circumstances and consider the defendant and the crime charged in making a determination of a sentence of either death or life imprisonment. Defendant claims that the jury instructions are in conflict with each other because U.J.I. Crim. 39.31 requires proof that the aggravating circumstance(s) are not outweighed by the mitigating circumstances and U.J.I. Crim. 39.33 requires a weighing of the aggravating circumstance(s) and mitigating circumstances against each other. The jury was instructed at the trial and sentencing stage to consider the jury instructions as a whole and not to pick out parts of one instruction and disregard others. N.M.U.J.I. Crim. 39.42, N.M.S.A. 1978 (Repl. Pamp. 1982). These instructions clearly require the jury, in weighing the aggravating circumstance(s) against the mitigating circumstances, to find that the aggravating circumstance(s) outweigh the mitigating circumstances before the penalty of death can be imposed.

Defendant also argues that U.J.I. Crim. 39.33 does not provide "clear and objective standards" which are "rationally reviewable". In GODFREY v. GEORGIA, 446 U.S. 420, 428 (1980), the United States Supreme Court stated that a sentencer's discretion must be channeled by " 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" However, this case dealt with Georgia's then aggravated circumstance statute in which a person convicted of murder could have been sentenced to death if it was found beyond a reasonable doubt that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." ID. at 422. The Court stated that this was too vague a description for an aggravated circumstance because any person could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." The Court stated that it will not permit a subsection of an aggravated circumstance statute to simply become a "catchall" for cases which do not fit within any of the other subsections. However, this is not the case with New Mexico's aggravated circumstance statute. Section 31-20A-5 specifically lists the aggravated circumstances that allow for the death penalty.

We can find NO United States Supreme Court case which states that mitigating circumstances must be specified in a "clear and objective standard". On the contrary, the United States Supreme Court has held that in a sentencing proceeding, a jury or judge must take into account the characteristics of the person as well as the circumstances of the offenses. EDDINGS v. OKLAHOMA, 455 U.S. 104 (1982); LOCKETT v. OHIO, 438 U.S. 586 (1978). Individual consideration must be given in a death sentencing proceeding. Therefore, a SUBJECTIVE STANDARD must be used for this review. We find no fault with these jury instructions.

Defendant did not object to these jury instructions at the time of trial. He raises this objection for the first time on appeal. We have repeatedly held that objections to jury instructions cannot be raised for the

first time on appeal when the defendant did not object to the instructions at trial. STATE v. NOBLE, 90 N.M. 360, 563 P.2d 1153 (1977); STATE v. RODRIGUEZ, 81 N.M. 503, 469 P.2d 148 (1970). Florida has recently ruled on this issue when a death sentence is involved. In VAUGHT v. STATE, 410 So. 2d 147 (Fla. 1982), the defendant argued that the court failed to provide the jury with complete instructions on aggravating and mitigating circumstances. The Florida Supreme Court held that "[s]ince [defendant] made no objection to the instructions below, this point may not be raised on appeal." ID. at 150. Also, the United States Supreme Court in a habeas corpus proceeding, has held that a defendant's failure to object to jury instructions precludes a challenge to the constitutionality of those instructions in a federal habeas proceeding. ENGLE v. ISAAC, ___ U.S. ___, 102 S. Ct. 1558 (1982).

Defendant, however, claims that these jury instructions can be attacked for the first time on appeal because of fundamental error pursuant to N.M.R. Crim. App. 308(b), N.M.S.A. 1978 and Section 31-20A-4(B). New Mexico's Rules of Evidence do not provide a different standard for admission of evidence or review of error simply because the possible punishment is death. Therefore, we continue to hold that objections to jury instructions CANNOT be raised for the first time on appeal.

V. PROPORTIONALITY REVIEW

Defendant argues that his sentence of death was "excessive and/or disproportionate" in comparison to the similar crime of Trujillo who received a sentence of life imprisonment.

The Capital Felony Sentencing Act, Section 31-20A-4(B) and the pertinent part of (C), states:

> B. In addition to the other matters on appeal, the supreme court shall rule on the validity of the death sentence.
>
> C. The death penalty shall not be imposed if:
>
> . . . .
>
> (4) the sentence of death is excessive or disproportionate to the penalty imposed in SIMILAR CASES, considering both THE CRIME AND THE DEFENDANT. [Emphasis added.]

This Section represents an act of the Legislature which we are required to interpret in accordance with sound rules of statutory construction. Section 31-20A-4(B) states that only this Court can decide if a sentence of death is excessive or disproportionate. In Section 31-20A-4(C), the Legislature directs this Court to review the death sentence to see if "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant". We assume that the Legislature means that in similar cases, considering both the crime and defendant, a defendant convicted of first degree murder under a specific aggravated circumstance should not be put to death if another defendant or other defendants, convicted of murder under the same aggravated circumstance is given life imprisonment, unless there is some justification. Therefore, we adopt the following guidelines for review under this Section.

> 1. We will review this issue only when raised on appeal.
>
> 2. In our review, we will consider only New Mexico cases in which a defendant has been convicted of capital murder under the SAME AGGRAVATING CIRCUMSTANCE(s). (f.n. 11)
>
> 3. Only those New Mexico cases in which a defendant was convicted under the same aggravating circumstance(s) and then received EITHER the death penalty OR life imprisonment and whose conviction and sentence have been upheld previously by this Court, will be considered appropriate for comparison.
>
> 4. We will review the record and compare the facts of the offense and all other evidence presented by way of aggravation or mitigation to determine whether the sentence is excessive or disproportionate.

In adopting these guidelines, we have reviewed the United States Supreme Court opinions that have discussed the issue of proportionality. GREGG v. GEORGIA, SUPRA, which first upheld the constitutionality of the death penalty,

addressed the issue of excessiveness of the punishment in relation to the death penalty. Under GREGG, a review of the punishment in the abstract, rather than in the particular, is to be considered when inquiring into excessiveness. Two aspects must be considered in determining whether a punishment is excessive and unconstitutional. (f.n. 12) COKER v. GEORGIA, 433 U.S. 584, 592 (1977), stated the requirements of GREGG as follows:

> (1) [The punishment] makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or
>
> (2) the punishment is grossly out of proportion to the severity of the crime.

When reviewing a sentence under this test, the Court pointed out that a judgment under such a review should not be, or appear to be, merely the subjective views of an individual Justice; rather, the Justices have a duty to review the case on an objective level. COKER v. GEORGIA, SUPRA. Whatever our own personal beliefs may be, the government of the States of the Union are, "government[s] of laws, and not of men." MARBURY v. MADISON, 5 U.S. (1 Cranch) 137, 163 (1803). Attention must also be given to the public attitudes concerning a particular sentence and to its history, precedent, legislative attitudes and the responses of the jurors. COKER v. GEORGIA, SUPRA. GREGG did such an analysis in determining that the death penalty for a deliberate murder was neither a purposeless imposition of a severe punishment nor grossly disproportionate for the crime.

The United States Supreme Court in GREGG found that the imposition of the death penalty for the crime of murder had a long history of acceptance in the United States and England. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every state. The United States Supreme Court repeatedly has recognized the appropriateness of the death penalty. TROP v. DULLES, 356 U.S. 86, 99 (1958) (Chief Justice Warren wrote "the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."); FRANCIS v. RESWEBER, 329 U.S. 459 (1947); IN RE KEMMLER, 136 U.S. 436 (1890); WILKERSON v. UTAH, 99 U.S. 130 (1878). Finally, the legislatures of at least thirty-five (35) states have enacted statutes which provide for the death penalty in at least some crimes that result in the death of another person. GREGG v. GEORGIA, SUPRA at 179-80. Therefore, the United States Supreme Court concluded that the death penalty for a deliberate murder is neither the purposeless imposition of severe punishment nor punishment grossly disproportionate for the crime. GREGG v. GEORGIA, SUPRA.

The United States Supreme Court has avoided imposing or suggesting a method or model for state appellate review of proportionality. STATE v. COPELAND, ____ S.C. ____, ____ S.E. ___ (No. 21808, filed November 10, 1982). This is obvious from the fact that the Texas statute, scrutinized in JUREK v. TEXAS, SUPRA, provided for no proportionality review. Also, in neither GREGG v. GEORGIA, SUPRA, nor PROFFITT v. FLORIDA, SUPRA, was there any language elevating proportionality review to constitutional prominence. STATE v. COPELAND, SUPRA. Therefore, the Court has left proportionate review to the individual states. ID.

The Court, however, appears to look at the ultimate result when deciding whether a petitioner's punishment is excessive or disproportionate. For example, the Court has found that the death penalty is excessive when such punishment is applied to a conviction for rape. COKER v. GEORGIA, SUPRA. Also, the death penalty is excessive when applied to an accomplice who aids and abets in a felony, where in the course of that felony a murder is committed by others than the accomplice, and the accomplice himself did not kill, attempt to kill, intend that the killing take place or know that lethal force would be employed. ENMUND v. FLORIDA, ___ U.S. ___, 102 S. Ct. 3368 (1982).

We find that Defendant's sentence of death for the deliberate murder of

Jewett is neither excessive nor disproportionate. We have THOROUGHLY reviewed the record and transcripts of Defendant's trial. Defendant ignores the evidence when he asserts that his situation is "similar" to Trujillo's, when claiming that his sentence is disproportionate. The evidence shows that the fight resulting in Jewett's death was started either because Defendant's pride was hurt or because Defendant would not do Bobby Garcia's porter duties. While Jewett had Trujillo in a "bearhug", Defendant turned his attentions from his attack on Bobby Garcia and intentionally and unmercifully stabbed Jewett from behind. Although Defendant and Trujillo were tried for the same crime, the evidence does differ as to the actions of each during the crime.

Proportionality REVIEW in New Mexico is first and foremost directed to the particular circumstances of a crime and the specific character of the defendant. In our duty to REVIEW the determination by the jury, we will not retry the case for what may be a better result.

VI. CONCLUSION

After having carefully reviewed the record and transcript in the case before us, we conclude that there was no error committed on the issues before us in this case and that the death sentence was validly imposed. Therefore, the judgment of the jury that Defendant be punished by death is affirmed. This case is remanded to the trial court to set the date of execution.

IT IS SO ORDERED.

s/RIORDAN, Justice

WE CONCUR:
s/PAYNE, C.J.
s/FEDERICI, J.
s/STOWERS, J.
SOSA, S.J., specially concurring on all issues except the issue of the imposition of death.

FOOTNOTES

1. Cellblock three is the maximum-security area of the New Mexico State Penitentiary. Cellblock three contains cells arranged along three tiers which are composed of the basement, the main floor and the second floor. The tiers of the cellblock are divided into a northside and a southside. Between these two sides, in the middle of the cellblock, is an officers' station. A locked grill separates the officers' station from the northside, another from the southside. These grills and the gates for each cell are controlled within a separately locked cage which is located inside the officers' station.
Except for daily showers and exercise, most of the inmates in cellblock three are locked within their individual cells. However, inmate porters have a relatively high degree of freedom on the tiers because they assist with the cleaning, meals, distribution of linen and other duties.
2. Jesse Trujillo, in a separate trial, was also tried and convicted for the murders of Bobby Carabajal Garcia and Officer Louis Jewett. He received two sentences of life imprisonment. His conviction was affirmed by the New Mexico Supreme Court. STATE v. TRUJILLO, ___ N.M. ___, ___ P.2d ___ (No. 13,888, filed November 30, 1982).
3. "Shank" is a prison term for a homemade knife.
4. Captain Joe Baca is a correctional officer at the New Mexico State Penitentiary. He has been a correctional officer at the Penitentiary for twenty-one (21) years.
5. This MOTION IN LIMINE also asked the trial court to preclude mention of Defendant's alleged threats against Lieutenant Mayfield and mention of charges against Defendant for the death of inmate Danny Moraga. The trial court also denied the motion on these points. The trial court's ruling on these two matters are not being contested on appeal.
6. The trial referred to in this passage was for the death of inmate Danny Moraga. Richard Reynaldo Garcia was tried and acquitted of the killing of Danny Moraga.

7. ROBINSON v. CALIFORNIA, 370 U.S. 660 (1962), held that the Eighth Amendment to the United States Constitution was applicable to the states through the Fourteenth Amendment to the United States Constitution.

8. The death penalty cases combined by the United States Supreme Court in FURMAN v. GEORGIA, 408 U.S. 238 (1972), were 1) Petitioner was convicted of rape in Georgia and sentenced to death, 2) Petitioner was convicted of murder in Georgia and sentenced to death, and 3) Petitioner was convicted of rape in Texas and sentenced to death.

9. Silver, CONSTITUTIONALITY OF THE NEW MEXICO CAPITAL PUNISHMENT STATUTE, 11 N.M.L. Rev. 269 (1981).

10. The aggravated circumstance to be considered in Richard Reynaldo Garcia's case is that "while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered an employee of the corrections and criminal rehabilitation department [correction department]." Section 31-20A-5(E), N.M.S.A. 1978 (Repl. Pamp. 1981). At the time of Bobby Carabajal Garcia's death, Section 31-20A-5(D), N.M.S.A. 1978 (Repl. Pamp. 1981), had not been enacted. Section 31-20A-5(D) includes the murdering of a prisoner as an aggravated circumstance.

11. It is the duty of the defendant's attorney to supply the Court with information of similar cases. Such information is of public record. Sections 14-3-1 through 14-3-25, N.M.S.A. 1978 (Orig. and Cum. Supp. 1982).

12. The cruel and unusual punishment clause of the Eighth Amendment is directed, in part, against all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged. ENMUND v. FLORIDA, ___ U.S. ___, 102 S. Ct. 3368 (1982).

SPECIALLY CONCURRING OPINION ON ALL ISSUES EXCEPT THE ISSUE OF THE IMPOSITION OF DEATH

SOSA, Senior Justice.

I concur with the majority opinion except as to the imposition of the death penalty. While I do not believe that the death penalty in and of itself is unconstitutional as cruel and unusual punishment, I would hold that New Mexico's Capital Felony Sentencing Act, Secs. 31-20A-1 through 31-20A-6, N.M.S.A. 1978 (Repl. Pamp. 1981), is unconstitutional under the U.S. CONST. amend. VIII and XIV and the N.M. Const., Art. II, Sections 13 and 18, for the following reasons: (1) the Uniform Jury Instructions used at sentencing are inconsistent, confusing and provide inadequate standards for the final decision between death and life imprisonment in that (a) "mitigating circumstance" is not defined, (b) the jury is not required to make a written statement that it has considered a particular mitigating circumstance, and (c) no standard is provided by which the jury may determine whether aggravating circumstances outweigh mitigating circumstances; (2) the statute does not provide a procedure for meaningful appellate review of either the sentencing decision or proportionality; and (3) the death penalty does not fall equally on all but, instead, New Mexico's statute and Uniform Jury Instructions allow for different treatment of equally culpable individuals.

I

The Uniform Jury Instructions used at sentencing, N.M.U.J.I. Crim. 39.10 through 39.34, N.M.S.A. 1978 (Repl. Pamp. 1982), and the death penalty statute, Sections 31-20A-1 through 31-20A-6, are inconsistent, confusing and provide inadequate standards for the final decision between death and life imprisonment.

The jury instructions relevant to this case are as follows:

> The law provides that you cannot sentence the defendant to death unless you are satisfied beyond a reasonable doubt that the murder was committed under one or more of the aggravating circumstances charged. The burden is always on the state to prove beyond a reasonable doubt that the murder was committed under one or more of

the aggravating circumstances charged and that the mitigating circumstances do not outweigh the aggravating circumstances.

It is not required that the state prove this beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense -- the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.

N.M.U.J.I. Crim. 39.31.

If you have unanimously agreed on a finding that one or more of the aggravating circumstances charged were present, you must then consider the penalty to be imposed in this case. In determining the penalty to be imposed, you must consider all of the evidence admitted during this sentencing proceeding and the evidence admitted during the trial in which the defendant was found guilty of murder. You must then consider whether there are any mitigating circumstances.

If you find there are mitigating circumstances, you must then weigh the mitigating circumstances against the one or more aggravating circumstances you have found in this case. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment.

N.M.U.J.I. Crim. 39.33.

The jury is required to complete a verdict form, N.M.U.J.I. Crim. 39.34, specifying which aggravating circumstance they have found. However, the jury is not required to state which mitigating circumstances they have considered nor are they required to state whether they have found that the mitigating circumstances do or do not outweigh the aggravating circumstances.

The basic requisite of a constitutionally valid capital sentencing procedure is that it must provide "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." WOODSON v. NORTH CAROLINA, 428 U.S. 280, 303 (1976); SEE GREGG v. GEORGIA, 428 U.S. 153 (1976); PROFFITT v. FLORIDA, 428 U.S. 242 (1976); JUREK v. TEXAS, 428 U.S. 262 (1976). The United States Supreme Court has said that

> FURMAN mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

GREGG, SUPRA, at 189. New Mexico's death penalty sentencing procedure does not meet these requirements.

The term "mitigating circumstance" is not defined by the death penalty statute or jury instructions. Indeed, the verdict form, N.M.U.J.I. Crim. 39.34, neither mentions mitigating circumstances nor requires any finding with respect to them. This exacerbates the problems inherent in N.M.U.J.I. 39.33 which gives the jury no guidance as to the meaning of "considering both the defendant and the crime." The only aggravating circumstances which a jury may consider are those specifically listed in the statute. Section 31-20A-5. Thus, the defendant and the crime may not be considered as an aggravating circumstance but ONLY in mitigation. The jury obviously should be instructed to this effect. Failure to so instruct the jury would allow them to consider the defendant and the crime in aggravation and would allow a juror to use his unfettered bias or prejudice against a defendant of a different ethnic or racial group.

N.M.U.J.I. Crim. 39.31 requires a finding of the negative proposition that "the mitigating circumstances do not outweigh the aggravating circumstances." An instruction to find a negative proposition is often confusing to a jury. The use of confusing instructions constitutes reversible error. SEE STATE v. WISE, 95 N.M. 265, 620 P.2d 1290 (1980).

N.M.U.J.I. Crim. 39.31 and 39.33 do not provide the jury with guidance as

to the standard to use in weighing aggravating circumstances against mitigating circumstances. For example, the jury has no way of knowing whether their weighing should be by a preponderance of the evidence or beyond a reasonable doubt. The jury is given no guidance in the event that the aggravating circumstances are equally balanced with the mitigating circumstances. Both the aggravating circumstances, which are necessary to support a death sentence in New Mexico, and the mitigating circumstances, which may mitigate against imposition of the death sentence, involve factual findings that are not required to be made and are not made at the guilt phase of the trial. Therefore, the sentencing statute requires that aggravating circumstances be found beyond a reasonable doubt. Section 31-20A-3. Similarly, there should be some standard for a finding that aggravating circumstances outweigh mitigating circumstances.

Due process requires reasonably clear guidelines for triers of fact in order to prevent arbitrary and discriminatory enforcement. SMITH v. GOGUEN, 415 U.S. 566 (1974). Due process protections are demanded where a new finding of facts must be made in order to support a particular sentencing outcome. SPECHT v. PATTERSON, 386 U.S. 605 (1967). The sentencing process, as well as the trial, must satisfy the Due Process Clause. GARDNER v. FLORIDA, 430 U.S. 349 (1977) (plurality opinion). Traditional due process standards forbid the imposition of sanctions under any procedure which "licenses the jury to create its own standard in each case." HERNDON v. LOWRY, 301 U.S. 242, 263 (1937); GIACCIO v. PENNSYLVANIA, 382 U.S. 399 (1966). Because New Mexico's statute and jury instructions fail to provide any standard, they are susceptible of improper application and are therefore unconstitutional.

A jury must be carefully and adequately guided in its deliberations. GREGG, SUPRA, at 193. Several states have given such direction to jurors in their death penalty statutes. Arkansas, North Carolina, Ohio and Washington require jury findings that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. ARK. STAT. ANN. Section 41-1302(1)(b) (1977); N.C. GEN. STAT. Section 15A-2000(c)(3) (Supp. 1981); OHIO REV. CODE ANN. Section 2929.03(D)(2) and (3) (Page 1981); WASH. REV. CODE ANN. 10.95.060(4) (1981). Connecticut prohibits the death sentence in any case where there exist any mitigating circumstances. CONN. GEN. STAT. Section 53a-46a(e) and (f) (1981).

The use of confusing and inadequate instructions constitutes reversible error. SEE STATE v. WISE, SUPRA; STATE v. DeSANTOS, 89 N.M. 458, 553 P.2d 1265 (1976); STATE v. BUHR, 82 N.M. 371, 482 P.2d 74 (Ct. App. 1971). The majority opinion is correct in that a defendant who neither objects to instructions given nor tenders his own waives his right to object for the first time on appeal. STATE v. NOBLE, 90 N.M. 360, 563 P.2d 1153 (1977). However, where a fundamental right of the accused has been violated, this Court may, in its discretion, see that injustice is not done. STATE v. GARCIA, 19 N.M. 414, 143 P. 1012, REH'G GRANTED, 19 N.M. 420, 143 P. 1014 (1914); STATE v. GARCIA, 46 N.M. 302, 128 P.2d 459 (1942). The defendant's rights to due process under the Fourteenth and Eighth Amendments are clearly fundamental where the outcome of a violation of his rights is that defendant is sentenced to die. New Mexico's statute and instructions fail to provide even the minimal guidance required. Accordingly, the sentence of death should be reversed in this case and the defendant sentenced to life in prison.

II

New Mexico's death penalty statute does not include procedures for the development of a record by which this Court may ascertain if a jury has imposed a death penalty on arbitrary or capricious grounds or under the influence of passion or prejudice. Nor does the statute provide for a record by which to determine if the evidence supports a finding that the mitigating circumstances do not outweigh the aggravating circumstances. No procedure is provided by which this Court may review whether a death sentence is excessive or disproportionate to penalties imposed

in similar circumstances, considering both the defendant and the crime. Thus, this Court is precluded from properly reviewing the jury's sentencing verdict.

This jurisdiction's doctrine of fundamental error, which encompasses within it any error that deprives an accused of a fundamental right, allows the assertion of the denial of a defendant's right to due process to be raised for the first time on appeal to see that justice is done. STATE v. GARCIA, 19 N.M. 414, 143 P. 1012, REH'G GRANTED, 19 N.M. 420, 143 P. 1014 (1914); STATE v. GARCIA, 46 N.M. 302, 128 P.2d 459 (1942). Therefore, Mr. Garcia may raise the issue of reviewability on appeal.

Section 31-20A-4 requires this Court to review every sentence of death.

> A. The judgment of conviction and sentence of death shall be automatically reviewed by the supreme court of the state of New Mexico.
>
> B. In addition to the other matters on appeal, the supreme court shall rule on the validity of the death sentence.
>
> C. The death penalty shall not be imposed if:
>
> (1) the evidence does not support the finding of a statutory aggravating circumstance;
>
> (2) the evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances;
>
> (3) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; or
>
> (4) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 31-20A-4(C).

Because the jury is given no standard by which to weigh the evidence at sentencing, this Court is denied any means for proper review of the sentencing verdict and is unable to determine if such a verdict is arbitrary or capricious.

The laws of Georgia, Florida and Texas, which have been approved by the United States Supreme Court, GREGG, SUPRA; RPOFFITT, SUPRA; JUREK, SUPRA, require the finding of at least one aggravating circumstance beyond a reasonable doubt to support a sentence of death. However, unlike New Mexico, these three states require written findings. Silver, CONSTITUTIONALITY OF THE NEW MEXICO CAPITAL PUNISHMENT STATUTE, 11 N.M.L. Rev. 269 (1981). The United States Supreme Court has never discussed the potential for incomplete appellate review because of inadequate written findings. ID. I believe that meaningful appellate review of a death penalty sentence is not possible without such written findings.

In GREGG, SUPRA, the United States Supreme Court relied on Georgia's appellate review of individualized death sentences in rejecting the defendant's contention that the Constitution's ban on cruel and unusual punishments barred the imposition of the death penalty under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.

> Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

ID. at 195. New Mexico's statute lacks procedures for making comparisons between cases. What kinds of cases are we to consider? What does similar mean? How far back in New Mexico's judicial history should comparisons be made? Should extrajudicial cases be brought into the analysis? Are cases which ended in plea bargains relevant? If a prosecutor exercises discretion in the charging process and seeks an indictment without aggravating circumstances, is that case similar? Is the record for review of proportionality to be established in the trial court? If the record for review is to be developed at the appellate level, are evidentiary hearings required? The language is, at best, susceptible of many different interpretations. Due process demands

proportionality review, COKER v. GEORGIA, 433 U.S. 584 (1977) (plurality opinion), and the Legislature apparently intended to comply with the requirement. However, this section is so vague that an accused is not accorded meaningful appellate review. I disagree with the guidelines for review of proportionality set forth in the majority opinion. This Court is statutorily mandated to review this issue whether it is raised on appeal or not. In addition, I believe that cases in which the death sentence is imposed should be compared to cases in which the defendant is charged with a capital offense under the same aggravating circumstances. Comparison should also be made to cases in which the defendant was CHARGED with a capital offense but which, for whatever reason, were not appealed to this Court.

In PROFFITT, SUPRA, the Court found that Florida's failure to formulate a rigid objective test as a standard of review did not necessarily render the appellate review process ineffective or arbitrary because the Florida court performed its function of death sentence review with a maximum of rationality and consistency. It cannot be said that this Court's review of Garcia's sentence is consistent with its review of Trujillo's sentence. SEE STATE v. TRUJILLO, 21 N.M. St. B. Bull. 1669 (1982), ____ N.M. ____, ____ P.2d ____ (1982). The difference in the evidence presented in the two cases is not significant enough to justify one defendant being sentenced to death and the other to life imprisonment. It is impossible to determine from the record who struck the blow that resulted in Officer Jewett's death.

It is interesting to note that the majority changed their opinion subsequent to my circulating a dissent calling attention to their failure to adopt guidelines for review of proportionality. Even though guidelines have now been set out, they still do not allow for a meaningful appellate review for the reasons I have set forth above. For the foregoing reasons, I believe that the Capital Felony Sentencing Act as a whole must fail as being in violation of the rights accorded by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and analogous provisions of the New Mexico Constitution. It is my judgment that we cannot impose the death penalty until we have set up some procedure so that a meaningful appellate review for proportionality can be had in accordance with Section 31-20A-4(C).

III

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." GARDNER, SUPRA, at 358. New Mexico's death penalty statute does not apply equally to all but allows for different treatment of equally culpable individuals. The arbitrary and capricious nature of this penalty has not been rectified by New Mexico's sentencing procedures. Without guidelines for the jury to follow and without an appropriate procedure for meaningful appellate review, this Court is unable to determine whether the jury has acted capriciously and is also unable to examine similar cases for proportionality. Under such vague language as is found in the New Mexico statute, the following problem arises:

> [T]he jury, on no grounds or on any grounds, articulated or not articulated, can spare any defendant's life either by refusing to sentence to death though "aggravating circumstances" be found, or as is more likely, simply failing, whatever the evidence, to find aggravating circumstances -- both being unreviewable actions. The strictly logical corollary is that the jury may, within the same field of death eligibles, fail to spare some others, and need give no reason for the difference. Arbitrary lenience equals arbitrary harshness, by an iron law of sheer identity.

Black, CAPRICE AND RACISM IN THE DEATH PENALTY, in FINAL REPORT ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES 21, 30 (1980). This is precisely the problem which has arisen under the facts of the Garcia case. Garcia and Trujillo were jointly indicted but, because of severance, they were separately

convicted of the murder of Officer Jewett. In TRUJILLO, SUPRA, the jury spared Trujillo's life by refusing to find the aggravating circumstance that while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered an employee of the corrections and criminal rehabilitation department. In this case, the jury found the same aggravating circumstance. If these cases had remained unsevered, the jury could not have made this inconsistent finding. Without this inconsistency, they both would have been given life or they both would have been given death. One cannot meaningfully distinguish the TRUJILLO case, in which the death sentence was not imposed, from the Garcia case, in which the death sentence was imposed.

We don't know why the TRUJILLO jury failed to find the aggravating circumstance. The jury may have been confused by the instructions or may have meant to find that the mitigating circumstances did outweigh the aggravating circumstances. A comparison of the TRUJILLO case with the instant case strongly illustrates that New Mexico's statute and jury instructions are inconsistent and confusing, that this Court cannot meaningfully review such death sentences, and that the statute and

jury instructions are fraught with the potential for different treatment of equally culpable individuals.

CONCLUSION

New Mexico's death penalty statute and jury instructions violate both the United States Constitution and the Constitution of the State of New Mexico. They are confusing, vague and fail to provide adequate, objective standards to guide the jury in its decision between death and life imprisonment. No procedure exists whereby this Court can meaningfully review the jury's decision. This Court does not have an adequate objective procedure to review capital felony cases for proportionality, nor does its review of this case meet the consistency requirement established in PROFFITT, SUPRA. Because the jury is inadequately instructed and because of the lack of reviewability, there is a great potential for different treatment of equally culpable defendants. Death cannot constitutionally result from such a process.

For the foregoing reasons, I respectfully dissent as to the imposition of the death sentence. I would hold that New Mexico's death penalty statute is unconstitutional and remand this case for the imposition of a sentence of life imprisonment.

s/SOSA, Senior Justice

ARTICLE 20A

Capital Felony Sentencing

Sec.

31-20A-1. Capital felony; sentencing procedure.
31-20A-2. Determination of sentence.
31-20A-3. Court sentencing.
31-20A-4. Review of judgment and sentence.
31-20A-5. Aggravating circumstances.
31-20A-6. Mitigating circumstances.

31-20A-1. Capital felony; sentencing procedure.

A. At the conclusion of all capital felony cases heard by jury, and after proper charge from the court and argument of counsel, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In nonjury capital felony cases, the judge shall first consider a finding of guilty or not guilty without any consideration of punishment.

B. Upon a verdict by the jury or judge that the defendant is guilty of a capital felony, or upon a plea of guilty to a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized herein. In a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury. In a nonjury trial the sentencing proceeding shall be conducted as soon as practicable by the original trial judge. In the case of a plea of guilty to a capital felony, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by a jury upon demand of a party.

C. In the sentencing proceeding, all evidence admitted at the trial shall be considered and additional evidence may be presented as to the circumstances of the crime and as to any aggravating or mitigating circumstances pursuant to Sections 6 [31-20A-5 NMSA 1978] and 7 [31-20A-6 NMSA 1978] of this act.

D. In a jury sentencing proceeding, the judge shall give appropriate instructions and allow argument and the jury shall retire to determine the punishment to be imposed. In a nonjury sentencing proceeding, or upon a plea of guilty, where no jury has been demanded, the judge shall allow argument and determine the punishment to be imposed.

History: Laws 1979, ch. 150, § 2.

31-20A-2. Determination of sentence.

A. Capital sentencing deliberations shall be guided by the following considerations:

(1) whether aggravating circumstances exist as enumerated in Section 6 [31-20A-5 NMSA 1978] of this act;

(2) whether mitigating circumstances exist as enumerated in Section 7 [31-20A-6 NMSA 1978] of this act; and

(3) whether other mitigating circumstances exist.

B. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, the jury or judge shall determine whether the defendant should be sentenced to death or life imprisonment.

History: Laws 1979, ch. 150, § 3.

31-20A-3. Court sentencing.

In a jury sentencing proceeding in which the jury unanimously finds beyond a reasonable doubt and specifies at least one of the aggravating circumstances enumerated in Section 6 [31-20A-5 NMSA 1978] of this act, and unanimously specifies the sentence of death pursuant to Section 3 [31-20A-2 NMSA 1978] of this act, the court shall sentence the defendant to death. Where a sentence of death is not unanimously specified, or the jury does

not make the required finding, or the jury is unable to reach a unanimous verdict, the court shall sentence the defendant to life imprisonment. In a nonjury sentencing proceeding and in cases involving a plea of guilty, where no jury has been demanded, the judge shall determine and impose the sentence, but he shall not impose the sentence of death except upon a finding beyond a reasonable doubt and specification of at least one of the aggravating circumstances enumerated in Section 6 [31-20A-5 NMSA 1978] of this act.

History: Laws 1979, ch. 150, § 4.

31-20A-4. Review of judgment and sentence.

A. The judgment of conviction and sentence of death shall be automatically reviewed by the supreme court of the state of New Mexico.

B. In addition to the other matters on appeal, the supreme court shall rule on the validity of the death sentence.

C. The death penalty shall not be imposed if:

(1) the evidence does not support the finding of a statutory aggravating circumstance;

(2) the evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances;

(3) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; or

(4) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. No error in the sentencing proceeding shall result in the reversal of the conviction of a capital felony. If the trial court is reversed on appeal because of error only in the sentencing proceeding, the supreme court shall remand solely for a new sentencing proceeding. The new sentencing proceeding ordered and mandated shall apply only to the issue of punishment.

E. In cases of remand for a new sentencing proceeding, all exhibits and a transcript of all testimony and other evidence admitted in the prior trial and sentencing proceeding shall be admissible in the new sentencing proceeding, and:

(1) if the sentencing proceeding was before a jury, a new jury shall be impaneled for the new sentencing proceeding;

(2) if the sentencing proceeding was before a judge, the original trial judge shall conduct the new sentencing proceeding; or

(3) if the sentencing proceeding was before a judge and the original trial judge is unable or unavailable to conduct a new sentencing proceeding, then another judge shall be designated to conduct the new sentencing proceeding and the parties are entitled to disqualify the new judge on the grounds set forth in Section 38-3-9 NMSA 1978 before the newly designated judge exercises any discretion.

History: Laws 1979, ch. 150, § 5.

31-20A-5. Aggravating circumstances.

The aggravating circumstances to be considered by the sentencing court or jury pursuant to the provisions of Section 31-20A-2 NMSA 1978 are limited to the following:

A. the victim was a peace officer who was acting in the lawful discharge of an official duty when he was murdered;

B. the murder was committed with intent to kill in the commission of or attempt to commit kidnaping, criminal sexual contact of a minor or criminal sexual penetration;

C. the murder was committed with the intent to kill by the defendant while attempting to escape from a penal institution of New Mexico;

D. while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered a person who was at the time incarcerated in or lawfully on the

premises of a penal institution in New Mexico. As used in this subsection "penal institution" includes facilities under the jurisdiction of the corrections and criminal rehabilitation department [corrections department] and county and municipal jails;

E. while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered an employee of the corrections and criminal rehabilitation department [corrections department];

F. the capital felony was commited for hire; and

G. the capital felony was murder of a witness to a crime or any person likely to become a witness to a crime, for the purpose of preventing report of the crime or testimony in any criminal proceeding, or for retaliation for the victim having testified in any criminal proceeding.

History: Laws 1979, ch. 150, § 6; 1981, ch. 23, § 1.

The 1981 amendment substituted "Section 31-20A-2 NMSA 1978" for "Section 3 of this act" in the introductory paragraph, added present Subsection D, redesignated former Subsections D, E and F as present Subsections E, F and G, and substituted "corrections and criminal rehabilitation department" for "corrections division" at the end of Subsection E.

Emergency clauses. — Laws 1981, ch. 23, § 3, makes the act effective immediately. Approved March 17, 1981.

Applicability. — Laws 1981, ch. 23, § 2, makes the act applicable only to persons sentenced for crimes committed on or after its effective date.

Corrections department. — Laws 1981, ch. 3, § 1, changed the name of the former corrections and criminal rehabilitation department, referred to in Subsections D and E, to the corrections department. See 9-3-3 NMSA 1978.

31-20A-6. Mitigating circumstances.

The mitigating circumstances to be considered by the sentencing court or the jury pursuant to the provisions of Section 3 [31-20A-2 NMSA 1978] of this act shall include but not be limited to the following:

A. the defendant has no significant history of prior criminal activity;

B. the defendant acted under duress or under the domination of another person;

C. the defendant's capacity to appreciate the criminalty [criminality] of his conduct or to conform his conduct to the requirements of the law was impaired;

D. the defendant was under the influence of mental or emotional disturbance;

E. the victim was a willing participant in the defendant's conduct;

F. the defendant acted under circumstances which tended to justify, excuse or reduce the crime;

G. the defendant is likely to be rehabilitated;

H. the defendant cooperated with authorities; and

I. the defendant's age.

History: Laws 1979, ch. 150, § 7.

Effective dates. — Laws 1979, ch. 150, § 13, makes the act effective on July 1, 1979.

Severability clauses. — Laws 1979, ch. 150, § 12, provides for the severability of the act if any part or application thereof is held invalid.

Temporary provisions. — Laws 1979, ch. 150, § 11, provides that the supreme court of New Mexico shall promulgate rules prior to the effective date of the act to regulate the procedure in capital felony cases for the selection and utilization of alternate jurors and substitute trial judges caused by the disability of any juror or trial judge before whom a capital felony sentencing proceeding has commenced pursuant to the act.

DEATH PENALTY

UJI Crim. 39.10. Explanation of death penalty sentencing proceeding; single aggravating circumstance.[1]

LADIES AND GENTLEMEN:

This is a sentencing proceeding to determine whether the defendant . . . . . .
name of defendant

should be punished by life imprisonment or by death.

I will outline specific procedures for you to follow in deciding the issues in this case. You must follow these procedures carefully. The law provides that a person who is convicted of the crime of murder may be sentenced to death only if the aggravating circumstance charged by the state is present.

The state has charged that the following aggravating circumstance was present: [2]

[the murder was of a peace officer who was performing his duties];
[the murder was committed during (the commission of)[3] (an attempt to commit) (kidnapping)[3] (criminal sexual contact of a minor) (criminal sexual penetration)];
[the murder was committed while attempting to escape from a penal institution];
[the murder was of an employee of the corrections division];
[the murder was for hire];
[the murder was of (a witness to a crime)[3] (a person likely to become a witness to a crime)].

You will first be asked to consider whether this aggravating circumstance was present. If you unanimously agree beyond a reasonable doubt that this aggravating circumstance was present, you must then weigh any mitigating circumstances in this case against this aggravating circumstance.

You must decide the case solely on the evidence admitted by the court during the trial in which the defendant was found guilty of murder and such additional evidence as may be presented during this sentencing proceeding. You must not consider anything you may have read or heard about the case outside the courtroom.

It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful. You may give the testimony of any witness whatever weight you believe it merits.

You are not permitted to take notes. You must rely upon your individual memories of the evidence.

If an exhibit is admitted in evidence, you should examine it by yourself. Do not talk about the exhibit with other jurors until you retire to deliberate. If you have a question during the proceeding, write out the question, sign it and give it to the bailiff.

No statement, ruling, remark or comment which I make during the course of the proceeding is intended to indicate my opinion as to how you should decide the issue or to influence you in any way. At times I may ask questions of witnesses. If I do, such questions do not in any way indicate my opinion about the facts or indicate the weight I feel you should give to the testimony of the witness.

Until you retire to deliberate the sentence, you must not discuss this matter or the evidence with anyone, even with each other. It is important that you keep an open mind and not decide the sentence to be imposed until the entire matter has been completed and submitted to you. Your special responsibility as jurors demands that throughout this proceeding you exercise your judgment impartially and without regard to any biases or prejudices that you may have.

The prosecuting attorney will now make an opening statement if he desires. The defendant's attorney may make an opening statement if he desires or may wait until later to do so.

What is said in the opening statement is not evidence. The opening statement is simply the lawyer's opportunity to tell you what he intends to prove.

Use Note

1. This instruction may only be used in death penalty sentencing proceedings where defendant has been convicted of a single murder and a single aggravating circumstance has been charged. If the defendant has been convicted of more than one capital offense, use UJI Criminal 39.11. If more than one aggravating circumstance is charged for the same murder, use UJI Criminal 39.11. It is to be given before opening statements. This instruction does not go to the jury room.

2. Use only the applicable bracketed alternative.

3. Use only the applicable alternative. [Adopted, effective July 1, 1979.]

UJI Crim. 39.12. Death penalty sentencing proceeding; issue of guilt.[1]

This is a sentencing proceeding only. The defendant has previously been convicted of murder, and it is your duty to determine the sentence to be imposed.

Although in this sentencing proceeding you should consider all evidence from the trial in which the defendant was found guilty of murder, you should not reconsider the question of the defendant's guilt.

Use Note

1. This instruction must be given in every death penalty sentencing proceeding after all the evidence has been completed. [Adopted, effective July 1, 1979.]

UJI Crim. 39.13. Death penalty sentencing proceeding; aggravating circumstances.[1]

The state has charged that the murder of . . . . . (name of deceased)

was committed under the following aggravating circumstance(s):[2]

[the murder was of a peace officer who was performing his duties];

[AND][3]

[the murder was committed during (the commission of)[4] (an attempt to commit) (kidnapping)[4] (criminal sexual contact of a minor) (criminal sexual penetration)];

[AND]

[the murder was committed while attempting to escape from a penal institution];

[AND]

[the murder was of (an inmate)[4] (person lawfully on the premises) of a penal institution];

[AND]

[the murder was of an employee of the corrections division];

[AND]

[the murder was for hire];

[AND]

[the murder was of (a witness to a crime)[4] (a person likely to become a witness to a crime)].

[A separate instruction will now be given to you for each of these aggravating circumstances.][5]

Use Note

1. This instruction must be given in every death penalty sentencing proceeding after all the evidence has been completed. The appropriate aggravating circumstance instruction(s) for which there is sufficient evidence must be given after this instruction. A separate instruction must be given for each murder committed. See UJI Criminal 39.13 through 39.20.

2. Use only the applicable bracketed phrase(s).

3. Use only if more than one aggravating circumstance is charged.

4. Use only the applicable alternative(s).

5. Use the bracketed material only if there are multiple aggravating circumstances. [Adopted, effective July 1, 1979; as amended, effective March 17, 1981.]

UJI Crim. 39.18. Death penalty sentencing proceeding; aggravating circumstances; murder of employee of corrections division; essential elements.[1]

Before you may find the aggravating circumstance of murder of an employee of the corrections division, you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. At the time defendant murdered ..... (name of victim) defendant was incarcerated in ..... (name of penal institution);

2. At the time ..... (name of victim) was murdered, ... (name of victim) was an employee of the corrections division of the department of criminal justice of the state of New Mexico; and

3. The defendant had the intent to kill;

[and][2]

[4. The defendant was 18 years of age or older at the time he committed the murder.][2]

Use Note

1. This instruction may only be used in a death penalty sentencing proceeding.

2. Use bracketed language upon request if sufficient evidence has been presented to raise an issue as to whether the defendant had reached the age of majority at the time the murder was committed. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

UJI Crim. 39.30. Death penalty proceeding; mitigating circumstances.[1]

Before determining the penalty to be imposed, you should consider any of the following mitigating circumstances you find to exist:[2]

[the defendant did not have any significant history of prior criminal activity];
[the defendant acted under duress or under the domination of another person];
[the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired];
[the defendant was under the influence of mental or emotional disturbance];
[the victim was a willing participant in the defendant's conduct];
[the defendant acted under circumstances which tended to justify, excuse or reduce the crime];
[the defendant is likely to be rehabilitated];
[cooperation by the defendant with authorities]; and
[the defendant's age].

You should also consider any other circumstances which you find to be mitigating.

Use Note

1. This instruction must be given in every death penalty sentencing proceeding.

2. Use only the bracketed alternative mitigating circumstances for which there is sufficient evidence. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

UJI Crim. 39.31. Death penalty sentencing proceeding; reasonable doubt; burden of proof.[1]

The law provides that you cannot sentence the defendant to death unless you are satisfied beyond a reasonable doubt that the murder was committed under one or more of the aggravating circumstances charged. The burden is always on the state to prove beyond a reasonable doubt that the murder was committed under one or more of the aggravating circumstances charged and that the mitigating circumstances do not outweigh the aggravating circumstances.

It is not required that the state prove this beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense — the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.

Use Note

1. This instruction must be given in all death penalty sentencing proceedings. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

UJI Crim. 39.32. Death penalty sentencing proceeding; jury procedure for consideration of aggravating circumstances.[1]

You must decide the issues in this case solely on evidence admitted by the court during the trial in which the defendant was found guilty of murder and such additional evidence as may have been presented during this sentencing proceeding. You must not consider anything you may have read or heard about the case outside the courtroom.

You must first consider whether the aggravating circumstance(s) charged were present in this case. An aggravating circumstance must be proved beyond a reasonable doubt. If you have a reasonable doubt as to whether an aggravating circumstance is present, it is your duty to find that it is not present.

[You must decide separately as to each of the aggravating circumstances charged in this case. If you cannot agree upon your finding as to all of the aggravating circumstances but can agree as to one [or more] of them, you must make your finding as to the one [or more] upon which you do agree.] [2]

In order to find an aggravating circumstance, you must agree unanimously.

A special finding form has been prepared for you for the aggravating circumstance(s) charged. For each aggravating circumstance upon which you have reached unanimous agreement, you shall complete the first part of the finding form indicating that the aggravating circumstance was found and having the foreman sign this part. If you cannot unanimously agree that the state has proved to your satisfaction beyond a reasonable doubt that an aggravating circumstance was present, you shall complete the first part of the finding form indicating that the aggravating circumstance was not unanimously agreed upon and having the foreman sign this part.

Use Note

1. This instruction must be given in every death penalty sentencing proceeding.

2. Use only applicable bracketed language. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

UJI Crim. 39.33. Death penalty proceeding; jury procedure for considering penalty to be imposed.[1]

If you have unanimously agreed on a finding that [the aggravating circumstance charged was] [one or more of the aggravating circumstances charged were][2] present, you must then consider the penalty to be imposed in this case. In determining the penalty to be imposed, you must consider all of the evidence admitted during this sentencing proceeding and the evidence admitted during the trial in which the defendant was found guilty of murder. You must then consider whether there are any mitigating circumstances.

If you find there are mitigating circumstances, you must then weigh the mitigating circumstances against [the aggravating circumstance] [one or more aggravating circumstances][2] you have found in this case. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment.

If you fail to unanimously agree that the death penalty should be imposed, a penalty of life imprisonment will be imposed by the court.

You shall now retire to the jury room and select one of you to act as foreman. That person will preside over your deliberations and will speak for the jury here in court.

Any findings and any verdict you reach in this case must be signed by your foreman on the form that will be provided and then you shall return with it to this courtroom.

Use Note

1. This instruction must be given in every death penalty sentencing proceeding.
2. Use only applicable bracketed alternative. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

UJI Crim. 39.34. Death penalty sentencing proceeding; sample forms of findings; aggravating circumstance findings; penalty findings.[1]

(style of case)

(circle appropriate alternative)

(We unanimously find) (we do not unanimously find) beyond a reasonable doubt the aggravating circumstance of . . . . . as charged.
set forth the aggravating circumstance

. . . . . .
FOREMAN

We unanimously agree that the defendant, ... , should be sentenced to death
name of defendant

in the manner provided by law.

. . . . . .
FOREMAN

DO NOT SIGN ON THIS LINE UNLESS THE JURY HAS FOUND AN AGGRAVATING CIRCUMSTANCE AND YOU HAVE SO INDICATED BY COMPLETING THE PART ABOVE AND SIGNING YOUR NAME ABOVE.

We do not unanimously agree that the defendant, ... , should be sentenced to
name of defendant

death in the manner provided by law.

. . . . . .
FOREMAN

Use Note

1. This instruction is for use only in death penalty sentencing proceedings. The court is to set forth the aggravating circumstances on this form prior to submission to the jury. A separate form is to be submitted for each aggravating circumstance to be submitted to the jury. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

UJI Crim. 39.40. Sentencing proceeding; credibility of witnesses.[1]

You alone are the judges of the credibility of the witnesses and the weight to be given to the testimony of each of them. In determining the credit to be given any witness, you should take into account his truthfulness or untruthfulness, his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have and the reasonableness of his testimony considered in the light of all the evidence in the case.

Use Note

1. This is a basic instruction and may be given in all habitual criminal and death penalty sentencing proceedings. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

UJI Crim. 39.41. Sentencing proceeding; defendant not testifying; no inference of guilt.[1]

You must not draw any inference of admission from the fact that the defendant did not testify in this sentencing proceeding, nor should this fact be discussed by you or enter into your deliberations in any way.

Use Note

1. This instruction must be given on request of a defendant who does not testify in a habitual criminal or death penalty sentencing proceeding and must not be given if the defendant objects. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

UJI Crim. 39.43. Sentencing proceeding; duty to consult.[1]

Your findings must represent the considered judgment of each juror. In order to return a finding, it is necessary that each juror agrees. Your finding must be unanimous.

It is your duty to consult with one another and try to reach an agreement. However, you are not required to give up your individual judgment. Each of you must decide the case for yourself, but you must do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own view and change your opinion if you are convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the purpose of reaching a finding.

You are judges — judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Use Note

1. This instruction must be given in every habitual criminal and death penalty proceeding. After the jury has retired for deliberation neither this instruction nor any "shotgun" instruction shall be given. [Adopted, effective July 1, 1979; as renumbered, effective March 17, 1981.]

UJI Crim. 39.42. Sentencing proceeding; duty to follow instructions.[1]

The law governing this case is contained in these instructions, and it is your duty to follow that law. You must consider these instructions as a whole. You must not pick out one instruction or parts of an instruction or instructions and disregard others.

Use Note

1. This is a proper instruction to be given in all habitual criminal and death penalty sentencing proceedings. [Adopted effective July 1, 1979; as renumbered, effective March 17, 1981.]

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INSTRUCTION NO. 1

The law governing this case is contained in these instructions, and it is your duty to follow that law. You must consider these instructions as a whole. You must not pick out one instruction or parts of an instruction or instructions and disregard others.

INSTRUCTION NO. 2

This is a sentencing proceeding only. The defendant has previously been convicted of murder, and it is your duty to determine the sentence to be imposed.

Although in this sentencing proceeding you should consider all evidence from the trial in which the defendant was found guilty of murder, you should not reconsider the question of the defendant's guilt.

INSTRUCTION NO. 3

The State has charged that the murder of Louie Jewett was committed under the following aggravating circumstance:

The murder was of an employee of the corrections division.

INSTRUCTION NO. 4

Before you may find the aggravating circumstance of murder of an employee of the corrections division, you must find that the State has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. At the time defendant murdered Louie Jewett, defendant was incarcerated in the New Mexico State Penitentiary;

2. At the time Louis Jewett was murdered, Louis Jewett was an employee of the Corrections Division of the Department of Criminal Justice of the State of New Mexico; and,

3. The defendant had the intent to kill Louis Jewett.

INSTRUCTION NO. 5

The law provides that you cannot sentence the defendant to death unless you are satisfied beyond a reasonable doubt that the murder was committed under the aggravated circumstance charged. The burden is always on the State to prove beyond a reasonable doubt that the murder was committed under the aggravating circumstance charged and that the mitigating circumstances do not outweigh the aggravating circumstances.

It is not required that the State prove this beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense - the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.

INSTRUCTION NO. 6

You must decide the issues in this case solely on evidence admitted by the court during the trial in which the defendant was found guilty of murder and such additional evidence as may have been presented during this sentencing proceeding. You must not consider anything you may have read or heard about the case outside the courtroom.

You must first consider whether the aggravated circumstance charged was present in this case. An aggravated circumstance must be proved beyond a reasonable doubt. If you have a reasonable doubt as to whether an aggravating circumstance is present, it is your duty to find that it is not present.

In order to find an aggravating circumstance, you must agree unanimously.

A special finding form has been prepared for you for the aggravting circumstance charged. For each aggravated circumstance upon which you have reached unanimous agreement, you shall complete the first part of the finding form indicating that the aggravating circumstance was found and have the foreman sign this part. If you cannot unanimously agree that the State has proved to your satisfaction beyond a reasonable doubt that an aggravating circumstance was present, you shall complete the first part of the finding form indicating that the aggravating circumstance was not unanimously agreed upon and have the foreman sign this part.

INSTRUCTION NO. 7

Before determining the penalty to be imposed, you should consider the following mitigating circumstances should you find any of them to exist:

1. The killing of Louis Jewett was not premeditated.

2. The defendant acted under circumstances which tended to justify, excuse, or reduce the crime.

3. The defendant acted under circumstances which tended to justify, excuse, or reduce the crime in that cell block 3 was under-staffed, out-dated, over-crowded, and was never intended to serve as a maximum-security facility.

4. The defendant's age.

The mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon Mr. Garcia. You should pay careful attention to each of these factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances relating to this case and/or to the defendant, Mr. Garcia, as reason for not imposing the death sentence.

INSTRUCTION NO. 8

You alone are the judges of the credibility of the witnesses and the weight to be given to the testimony of each of them. In determining the credit to be given any witness, you should take into account his truthfulness or untruthfulness, his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have and the reasonableness of his testimony considered in the light of all the evidence in the case.

INSTRUCTION NO. 9

Evidence has been admitted that the defendant has been convicted of crimes other than the crimes charged in this case. You may consider such evidence solely for the purpose of determining whether or not the witness told the truth when he testified in this case and for no other purpose.

INSTRUCTION NO. 10

You must not draw any inference of admission from the fact that the defendant did not testify in this sentencing proceeding, nor should this fact be discussed by you or enter into your deliberations in any way.

INSTRUCTION NO. 11

Your findings must represent the considered judgment of each juror. In order to return a finding, it is necessary that each juror agrees. Your finding must be unanimous.

It is your duty to consult with one another and try to reach an agreement. However, you are not required to give up your individual judgment. Each of you must decide the case for yourself, but you must do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own view and change your opinion if you are convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the purpose of reaching a finding.

You are judges - judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

INSTRUCTION NO. 12

If you have unanimously agreed on a finding that the aggravating circumstance charged was present, you must then consider the penalty to be imposed in this case. In determining that penalty to be imposed, you must consider all of the evidence admitted during this sentencing proceeding and the evidence admitted during the trial in which the defendant was found guilty of murder. You must then consider whether there are any mitigating circumstances.

If you find there are mitigating circumstances, you must then weigh the mitigating circumstances against the aggravating circumstance you have found in this case. After weighing the aggravating circumstance and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment.

If you fail to unanimously agree that the death penalty should be imposed, a penalty of life imprisonment will be imposed by the Court.

You shall now retire to the jury room and select one of you to act as foreman. That person will preside over your deliberations and will speak for the jury here in court.

Any findings and any verdict you reach in this case must be signed by your foreman on the form that will be provided and then you shall return with it to this courtroom.

INSTRUCTION NO. 13

...TE COUNTY

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COUNTY OF SANTA FE

FILED IN MY OFFICE OF THE ... COURT

DOLORES LUCERO CLERK

STATE OF NEW MEXICO

IN THE FIRST JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

vs.

No. SF 81-70 (CR)

RICHARD REYNALDO GARCIA,

Defendant.

(circle appropriate alternative)

(We unanimously find) (we do not unanimously find) beyond a reasonable doubt the aggravating circumstance of murder of an employee of the corrections division as charged.

Nancy E. Myers
FOREMAN

We unanimously agree that the defendant, RICHARD REYNALDO GARCIA, should be sentenced to death in the manner provided by law.

Nancy E. Myers
FOREMAN

DO NOT SIGN ON THIS LINE UNLESS THE JURY HAS FOUND AN AGGRAVATING CIRCUMSTANCE AND YOU HAVE SO INDICATED BY COMPLETING THE PART ABOVE AND SIGNING YOUR NAME ABOVE.

We do not unanimously agree that the defendant, RICHARD REYNALDO GARCIA, should be sentenced to death in the manner provided by law.

FOREMAN

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Office-Supreme Court, U.S.
FILED
MAY 17 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-6424

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1982

RICHARD REYNALDO GARCIA,

Petitioner

V.

THE STATE OF NEW MEXICO

Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of New Mexico

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS FOR REVIEW

Are New Mexico's Uniform Jury Instructions for capital sentencing proceedings unconstitutional in that:

1. the instructions provide insufficient guidance about the relationship between aggravating and mitigating circumstances and the burden of proof thereon; and

2. the instructions, by permitting unrestricted consideration of "the defendant and the crime," do not sufficiently channel discretion according to clear and objective standards?

PRELIMINARY STATEMENT

The Respondent State of New Mexico pursuant to Rule 34.2, does not deem a statement of the case nor the noted exceptions in the foregoing rule necessary for inclusion in this Brief in Opposition. Petitioner adequately sets out those matters required by Rule 34.1.

SUMMARY OF ARGUMENT

Petitioner Garcia presents two questions for review by this Court. The first question does not warrant review by this Court for it lacks significant constitutional importance. Additionally, the prior decisions of this Court have adequately addressed the issue presented in the first question. There is no conflict in the cases relied upon by petitioner.

The second question does not merit further review by this Court for its lack of substantial constitutional import. The New Mexico Supreme Court relied upon the prior decisions of this Court which have adequately addressed the second question presented. Finally, the second question was not raised in the trial court and does not have an adequate trial court record to afford full development or treatment of the question now presented.

ARGUMENT

Petitioner Garcia presents two issues for the Court's consideration. First, whether the jury instructions in this case provided sufficient guidance regarding the relationship between aggravating and mitigating circumstances and the burden of proof thereon. Secondly, whether the instructions sufficiently channeled discretion by permitting unrestricted consideration of "the defendant and the crime"? (Petition, Questions for Review, 6).

Respondent State of New Mexico, believes that neither question warrants review by this Court. Both questions have been adequately addressed by this Court's previous decisions and do not justify further review. Rule 17, Supreme Court Rules.

The first portion of the first issue queries whether the jury instructions in this case provide sufficient guidance about the relationship between aggravating and mitigating circumstances. This does not involve a question of constitutional significance. As a matter of basic logic, any capital jury is called upon to consider, balance, and weigh various circumstances in aggravation or in mitigation. The instructions contested here set out the inherent competition between the two forms of circumstances that the jury must resolve in deciding the weighty question of life or death. (R.P. 180-2, 187). The Court recognized this in Profitt v. Florida, 428 U.S. 242, 257 (1976). The only conceivable relationship between aggravating and mitigating circumstances is that they must be balanced against each other and a decision rendered from that judgmental process. There is no requirement for this Court to state such a principle as a matter of constitutional law.

The second element of the first question involves the burden of proof between aggravating and mitigating circumstances. This question likewise

does not require the attention of this Court. Petitioner suggests a conflict between Harris v. Pulley, 692 F.2d 1189, (9th Cir. 1982) and Ford v. Strickland, 696, F.2d 804 (11 Cir. 1983) with State v. Wood, 648 P.2d 71, 83 (Utah, 1982) (Pet. 6). There is not a conflict.

Ford and Harris rejected habeas claims that state sentencing processes were unconstitutional to the extent that they did not require aggravating circumstances to outweight mitigating circumstances beyond a reasonable doubt.

In State v. Wood, supra, the Utah Supreme Court dealt with a statute which contained no burden of proof to either the existence of an aggravating circumstance or the balance of proof between aggravating and mitigating circumstances. Of particular concern to the Wood court was a statute which not only failed to assign any weight to find the existence of an aggravating factor but even omitted directions to the jury to compare aggravating and mitigating factors. As the Wood court noted, "The sentencing authority is simply directed by Section 76-3-2072 "to 'consider the penalty'." 648 P.2d at 79. Finally, the holding in State v. Wood, supra, was premised solely on statutory constrution grounds. Wood explicitly declined to assign either state or federal constitutional grounds as a basis for its holding. (The disagreement, if any, suggested by Petitioner between the cited cases does not raise a substantial, federal constitutional issue.)

The New Mexico Statute requires proof beyond a reasonable doubt of the aggravating circumstances before the jury even reaches any balancing test. (31-20A-2 and 3, N.M.S.A., 1978 Pet. App. 29). Thus, Wood is inapplicable to this question.

There is no substantive issue presented which requires or justifies review by the Court on either part of the first question. Rule 17, Supreme Court Rules.

The second question presented by Petitioner is also of insufficient import to merit review by this Court. The arguments by Petitioner overlook the inherent subjectivity that is essential to considering, finding and weighing mitigating circumstances.

The prior decisions of this Court provide the answer Petitioner asserts is needed in his case. This Court has yet to hold that the instructions to a capital jury must remove all measure of discretion. Indeed, given the subjective, unlimited nature of mitigating circumstances mandated by this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), the instructions must necessarily allow the jury some discretionary latitude in order to fully consider the mitigating circumstances.

The New Mexico Supreme Court's decision recognized this Court's requirement that individual consideration is inherently subjective and must be so to afford a capital defendant a constitutionally adequate penalty hearing. (Petition Appendix, Section B, 144). Both the decisions of this Court and the New Mexico Supreme Court have answered the question presented here and thus, there is no reason for this Court to further review the same ground. Lockett v. Ohio, supra; State v. Garcia, Pet. App. Section B.

Finally, the issue presented by the second question was raised for the first time on appeal. Petitioner has not demonstrated that the complained-of instruction was prejudicial to his case, that there was any evidence of an aggravating nature within the context of "considering both the defendant and the crime" or that the jury decision was based upon any such evidence. The speculative nature of the second question portends, at best, an academic analysis of the instruction now challenged in this Court. Absent an appropriate trial court record, there is no substantial matter for this Court to review.

CONCLUSION

For the reasons presented, the Respondent State of New Mexico respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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